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No. 93-716

In the Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court, U.S.
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OLIN CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in reviewing the Federal Trade Commission's finding that an acquisition by petitioner threatened a substantial lessening of competition in the market for dry sanitizers for swimming pools, the court of appeals correctly held that substantial evidence supported the Commission's finding that petitioner was a viable manufacturer of one of the dry sanitizers, although it purchased, rather than produced, a chemical used to make the product.

2. Whether the court of appeals correctly held substantial evidence supported the Commission's delineation of the relevant product market, although consumers did not ordinarily switch between products unless the price of one increased by more than five percent.

3. Whether the court of appeals improperly accepted an argument made for the first time in the Commission's brief in the court of appeals, in response to an issue that petitioner failed to raise before the agency.

4. Whether the Commission's remedial order requiring petitioner to divest virtually all of the assets it acquired unlawfully was within its discretion.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-30a, is reported at 986 F.2d 1295. The opinion of the Federal Trade Commission, Pet. App. 31a-76a, and a redacted public version of the findings and conclusions of the Administrative Law Judge (ALJ) are published at 113 F.T.C. 400 (1990).

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1993. A petition for rehearing was denied on August 12, 1993. The petition for a writ of certiorari was filed on November 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures two chemicals used to sanitize swimming pools by killing the bacteria and algae in them: calcium hypochlorite (cal hypo) and chlorinated isocyanurates (isos). Before the acquisition at issue, petitioner manufactured approximately 80% of the domestic supply of cal hypo and 12% of the isos. Pet. App. 44a-45a; ID ¶¶ 11, 576, 113 F.T.C. at 420, 529-530.[1]

Petitioner, a relatively recent entrant into isos, did not begin to build its isos facilities until 1977. Pet. App. 53a. After experiencing difficulty in efficiently manufacturing cyanuric acid (CA), one of the ingredients used to make isos, in 1980 petitioner began buying CA from Nissan, a Japanese isos manufacturer. *Id.* at 53a-54a. In 1984, petitioner stopped buying CA from Nissan and instead entered into a "tolling agreement" with Monsanto, the leading isos manufacturer, pursuant to which petitioner supplied Monsanto with certain raw ingredients that Monsanto converted into isos for petitioner. *Id.* at 55a. Petitioner closed its isos manufacturing plant, but maintained it in a condition to reopen. *Ibid.*

In 1985 petitioner contracted with FMC Corporation, the third domestic isos manufacturer, to acquire FMC's facilities for producing and packaging isos. Pet. App. 32a. The acquisition gave petitioner 48% of the isos market and 57% of the combined market for isos and cal hypo (measured by production capacity), making it the dominant firm in the industry. *Id.* at 7a n.2, 62a; ID ¶¶ 570-571, 577-579, 113 F.T.C. at 527-528, 530.

2. Pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, the parties notified the Federal Trade Com-

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[1] "ID" refers to Initial Decision of the ALJ; parallel citations are provided to the published version of the ALJ's decision.

mission before consummating the transaction. To avoid a preliminary injunction against the acquisition, petitioner agreed to maintain FMC's assets in good condition while litigation was pending, and to withdraw from the tolling agreement with Monsanto.[2] Pet. App. 4a. The Commission issued an administrative complaint alleging that the acquisition violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.[3] Following trial, the ALJ found the acquisition unlawful. 113 F.T.C. at 414-586.

The Commission affirmed the ALJ's decision. The Commission stated that "product markets are defined either by 'the reasonable interchangeability of use or the cross-elasticity of demand.'" Pet. App. 37a-39a, quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962). Based on similarities in form, function, and convenience to consumers, the Commission found that cal hypo and isos were "effective substitutes for one another." *Id.* at 40a-41a. The Commission also found that manufacturers of pool sanitizing chemicals recognized that isos and cal hypo competed with each other and that the price of one sanitizer affected demand for the other. Petitioner and other makers and sellers of cal hypo took the price of isos into consideration when pricing their own product, and manufacturers (including petitioner) made other business decisions based on the competition between the two chemicals. Pet. App. 41a-43a & nn.7-8,

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[2] Petitioner errs in suggesting (Pet. 4) that the Commission agreed to that arrangement in recognition of petitioner's alleged lack of viability as an isos producer. See 113 F.T.C. at 405, 409 (stating purposes of the agreement).

[3] Section 7 prohibits acquisitions that may substantially lessen competition in any line of commerce. Section 5 prohibits unfair methods of competition in or affecting commerce.

45a n.10, 50a n.14; ID ¶¶ 205-263, 113 F.T.C. at 460-471. During a period when the price of cal hypo began to approach that of isos, many cal hypo users switched to isos. Pet. App. 41a-42a.

Based on that evidence, the Commission concluded that, after the narrowing of the price differential between the two products, a small but significant and nontransitory increase in cal hypo prices would shift demand to isos, and that a firm with market power in both chemicals could profitably impose a small but significant increase in the price of both without shifting demand to other products (such as liquid pool bleach). Pet. App. 44a-45a. Accordingly, it concluded that isos and cal hypo together formed a "dry sanitizers" product market. *Id.* at 45a-46a.[4]

The acquisition left only three significant producers in the dry sanitizers market and two in the isos market. After considering the extremely high levels of concentration, market history, entry barriers, and other factors, the Commission concluded that the acquisition was likely substantially to lessen competition in both markets in the United States. Pet. App. 62a-73a, 76a.

The Commission rejected petitioner's defense that it was not a viable producer of isos because it lacked a captive supply of CA. Pet. App. 52a-59a. The Commission found that petitioner's reliance on Nissan for CA did not hinder petitioner's competitive position. Because Nissan was dependent on petitioner to buy its excess CA, it had a strong incentive to provide petitioner with a reliable and competitively priced source of CA. *Id.* at 54a-58a. The Commission also found that petitioner had viable alternatives to Nissan, including other CA suppliers or

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[4] The parties also agreed that isos alone was a relevant product market, and the Commission agreed. Pet. App. 44a, 50a.

resumption of manufacture of CA. *Id.* at 56a-57a; ID ¶¶ 548-558, 654-655, 113 F.T.C. at 523, 549.

Accordingly, the Commission held that petitioner's pre-acquisition share of the isos market did not overstate its competitive strength and that the acquisition was likely substantially to lessen competition in the markets for isos and for dry sanitizers. Pet. App. 52a-59a, 76a. The Commission ordered petitioner to divest substantially all of the assets it had acquired from FMC. *Id.* at 74a-76a.

3. On petition for review, the court of appeals upheld the Commission's decision. Pet. App. 1a-30a. Reviewing the Commission's factual findings under the substantial evidence standard, *id.* at 5a, citing, *inter alia*, *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986), the court sustained the Commission's finding that isos and cal hypo were reasonably interchangeable in terms of function and consumer acceptance, *id.* at 13a-14a, and that cross-elasticity of demand existed between isos and cal hypo, *id.* at 14a-21a. In light of that evidence and other factors, the court sustained the Commission's finding of a dry sanitizers market. *Id.* at 22a.

The court rejected petitioner's defense that it was not a viable producer of isos because it could not efficiently manufacture CA. The court accepted the Commission's finding that petitioner was a viable isos producer. Pet. App. 26a-28a.

Finally, the court found that the Commission had not abused its discretion in requiring petitioner to divest FMC's CA facilities along with FMC's isos facilities. The court noted that divestiture of the CA facilities was needed to "ensure the viability of the divested entity as an ISOS producer" and that petitioner had pointed to no evidence that the two facilities could be physically separated. Pet. App. 30a.

ARGUMENT

1. Petitioner contends (Pet. 5-6, 9-15) that under *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), its pre-acquisition share of the isos market, and its competitive significance as an independent entity, should have been discounted because it had been unable efficiently to manufacture its own supply of CA (one of the ingredients needed to make isos) and had resorted to purchasing CA from a Japanese isos manufacturer, Nissan. Based on the record of petitioner's dealings with Nissan and other firms selling CA and petitioner's statements to another government agency, the Commission found that petitioner was a viable presence in the isos market. Pet. App. 52a-59a. The court of appeals held that substantial evidence supported the Commission's finding, *id.* at 22a-28a, and that determination warrants no further review.

In *General Dynamics*, the Court held that the historic production levels of a coal-producing firm that was involved in a merger overstated the firm's future competitive potential, because the firm's coal reserves were depleted or already committed under long-term contracts. 415 U.S. at 501-504, 508. Petitioner argues (Pet. 10, 12) that the court of appeals rendered the *General Dynamics* doctrine "meaningless" in this case by holding "that the technical inability to *make* a product has no bearing upon a firm's competitive significance in the marketplace since a firm can always rely upon another firm (even a competitor) to manufacture for it or supply it with the critical inputs that it cannot make."

The court of appeals did not issue such a broad holding. The court recognized that *General Dynamics* "emphasizes that market shares may not disclose the true competitive ability of a firm," Pet. App. 23a, and it

considered the claim, under that principle, that petitioner was not a viable isos competitor because it depended on CA suppliers. *Id.* at 26a-28a. On the facts of this case, however, the court upheld the Commission's finding that petitioner "was able to obtain as much CA as it wished from Nissan," that it could do so at a "competitively determined" price, and that it therefore functioned as a viable isos "competitor prior to the acquisition of the FMC assets."[5] *Id.* at 26a.

Petitioner's objection to that conclusion rests on the factbound claim (Pet. 14) that its "reliance upon Nissan for CA reduced [petitioner] to a competitively unimportant isos producer." That claim raises no legal issue of general importance and, in any event, lacks merit. In petitioner's view (Pet. 13-14), Nissan's position as an alleged monopoly supplier of CA allowed Nissan to charge petitioner monopoly prices and to control petitioner's output of isos by controlling its access to CA. That argument, however, is based solely on general economic theory. Pet. 13 & n.8. The record in this case established otherwise.[6] Nissan had substantial excess capacity to make CA and it depended on petitioner to buy its

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[5] That rationale is not inconsistent with the result in *General Dynamics*. Pet. 14. The firm in that case did not have established supply relationships with other coal producers, and, in this case, unlike in *General Dynamics*, petitioner needed a supply only of a component of the end-product, not the product itself.

[6] Petitioner's claim to be the only nonintegrated producer of isos (Pet. 13) is also incorrect. Prior to the acquisition, none of the domestic isos producers was fully integrated. Indeed, petitioner manufactured other important isos ingredients that its domestic rivals had to purchase. See ID ¶¶ 382, 445, 113 F.T.C. at 491, 503. Moreover, the record showed that petitioner's need to purchase CA did not place petitioner at a significant cost disadvantage. Pet. App. 57a-58a & n.15, 67a-68a.

surplusage. Pet. App. 54a, 56a. Petitioner was thus able to force Nissan to reduce its CA price by cutting back its CA purchases. *Id.* at 55a; ID ¶¶ 669-670, 699, 113 F.T.C. at 551-552. Those facts, among others, support the court of appeals' rejection of petitioner's claim that Nissan charged it supracompetitive prices for CA. Pet. App. 26a. Far from controlling petitioner's output, Nissan unfailingly supplied petitioner's needs and even offered to increase its CA manufacturing capacity. See *id.* at 26a, 54a-56a.

Moreover, contrary to petitioner's claims (Pet. 4, 13), Nissan was not the only CA supplier available to petitioner. Petitioner acknowledged that there were other, lower-priced CA producers willing to sell to it. The Commission also found that petitioner had considered both pursuing these other suppliers and resuming manufacture of CA. Pet. App. 57a-58a. Petitioner preferred Nissan, however, which it described as a "natural 'fit'" with petitioner's business. ID ¶¶ 665, 696, 113 F.T.C. at 550, 552; see Pet. App. 66a-68a.

In light of the record, petitioner's argument that it was subject to monopolistic prices in CA that undermined its effectiveness as an isos competitor conflicts with "market realities." See *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 112 S. Ct. 2072, 2082 (1992). This case therefore raises no broad principle of law under *General Dynamics*, does not conflict with the court of appeals decisions petitioner cites (Pet. 10, 12 n.7), and raises no issue worthy of this Court's review.[7]

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[7] Petitioner suggests that the court "incorrectly permitted the FTC to saddle [petitioner] with the burden of persuasion, rather than a mere burden of coming forward" on the issue of its viability as a pre-acquisition competitor. Pet. 10 n.6, citing *United States* v. *Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990). As the court of appeals pointed out, however, Pet. App. 24a, petitioner's

2. Petitioner next contends (Pet. 6, 15-22) that the court of appeals erred in its decision to uphold the Commission's finding that a relevant product market existed for dry sanitizers. According to petitioner, the court's finding of a relevant market conflicts with *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), in which the Court stated that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." In petitioner's view, there was no significant cross-elasticity of demand between isos and cal hypo and therefore no relevant combined market for those products.

As the court of appeals noted, "[t]he importance of [petitioner's] challenge to the dry sanitizers market is * * * questionable," because the "Commission's finding of likely anticompetitive effect [of the acquisition of FMC assets] might still be upheld based on the analysis of the ISOS-only market even if the finding of a dry sanitizers market is not supported by substantial evidence." Pet. App. 7a.[8]

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contention is based on selective and out of context quotation of phrases from the Commission's opinion. (Compare petitioner's excerpted quotations, *ibid.*, with the full text of the Commission's statements, *id.* at 58a n.15, 59a.) Moreover, as the court stated, *Baker Hughes* is distinguishable from this case because "the Commission responded to the Company's rebuttal, whereas in *Baker Hughes* the government did not. * * * In the present case, the Commission pointed to evidence indicating why petitioner's viability argument should fail. The Commission is able to do this because it is [petitioner's] burden to rebut a prima facie case of illegality." Pet. App. 25a.

[8] The Commission noted that the "level of concentration in the [isos]-only market proposed by [petitioner] is also very high," is "similar to the concentration levels in the dry pool sanitizer market," and "raise[s] the same competitive concerns." Pet. App. 64a.

In any event, petitioner's challenge lacks merit. Petitioner argues (Pet. 17) that there was "undisputed lack of meaningful cross-elasticity of demand between" isos and cal hypo (*ibid.*); that the court ignored the price differential between isos and cal hypo in considering the market definition issue (Pet. 15-16); and that the court effectively held that there is "no limit" to the amount of a hypothetical price increase used to measure cross-elasticity (Pet. 6, 17, 20-21). None of those claims is supported by the record.

First, the court recognized that the Commission had found a significant degree of cross-elasticity of demand between isos and cal hypo. The court expressly noted that a chart, obtained from petitioner's files, showed that as the price of cal hypo began to rise relative to the price of isos, cal hypo lost market share to isos. Pet. App. 17a n.6, reproducing ID ¶ 197, 113 F.T.C. at 458. Referring to the Commission's findings, the court stated:

> Ultimately, the Commission concluded that "[a]fter the price spread between [CAL/HYPO] and [ISOS] narrowed, [petitioner] could not profitably impose a small but significant and nontransitory increase in

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The court of appeals, while finding that the Commission's discussion of this issue was less complete than its discussion of the dry sanitizers market, ultimately found that "there is evidence supporting the Commission's conclusion regarding likely anti-competitive effect on the ISOS-only market." *Id.* at 7a & n.2. The court's subsequent statement, *id.* at 8a, that the Commission may not have considered whether petitioner's pre-acquisition isos business was viable "before assessing the acquisition's effect in regard to the isos-only market" would not provide a ground for setting aside the Commission's decision (or suggest that the court would have done so), because the court later held that the Commission correctly found that petitioner's pre-acquisition isos business *was* viable. See pp. 6-8, *supra*.

> the price of [CAL/HYPO] because of the danger that consumers would then switch to [ISOS]." Given this indication of cross-elasticity of demand, the Commission concluded that ISOS and CAL/HYPO together compose a relevant product market (i.e., the dry sanitizers market).

Pet. App. 14a, quoting *id.* at 45a. The panel concluded: "In sum, we find adequate support for the Commission's finding of cross-elasticity between ISOS and CAL/HYPO." *Id.* at 21a.

Second, the court did not, as petitioner contends (Pet. 15-16), ignore the price differential between isos and cal hypo. It expressly noted the Commission's analysis of "whether this [price] premium is sufficient to prevent the inclusion of ISOS and CAL/HYPO in the same market," Pet. App. 14a, and affirmed the Commission's conclusion that it did not. *Id.* at 16a-21a; see also *id.* at 43a-44a. Petitioner's argument (Pet. 16) thus reduces to the proposition that the price difference between isos and cal hypo "required a finding," as a matter of law, that the two products are in different markets. That claim is not supported by *Brown Shoe* or other cases considering the issue. Rather, courts have held that price differentials, although relevant, are not dispositive, particularly where there is price interaction between the products.[9]

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[9] *United States* v. *Continental Can Co.*, 378 U.S. 441, 455 (1964) ("That there are price differentials between the two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue."); *United States* v. *Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988), cert. denied, 493 U.S. 809 (1989); *Nifty Foods Corp.* v. *Great A&P Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980). See also *Liggett & Myers Inc.*, 87 F.T.C. 1074, 1147 (1976), aff'd, 567

Third, petitioner asserts (Pet. 16-17) that the court of appeals "effectively found that there is no limit to the hypothetical price increase" that can be used to determine cross-elasticity of demand, because of the court's statement (Pet. App. 18a) that a "finding of cross-elasticity * * * is not precluded by the fact that a higher price increase is necessary to induce a switch" from cal hypo to isos. The court's statement, however, was made in response to petitioner's argument that *only* a price increase not exceeding five percent is relevant to determining cross-elasticity of demand.[10] See *id.* at 10a, 18a. The court of appeals disagreed with that contention.[11] The court's decision not to limit consideration of a price increase to five percent does not conflict with the deci-

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F.2d 1273 (4th Cir. 1977) (premium and economy dog foods were in same market despite 100% price difference).

[10] The five percent figure was derived from the Department of Justice's *Merger Guidelines—1984* § 2.11 (1984 Guidelines), which articulate the product market test as whether a "small but significant" price increase will cause switching between two products. Although "in most contexts" the Guidelines will use a five percent increase, they expressly state that a hypothetical increase above five percent is appropriate in some cases. 1984 Guidelines § 2.11 & n.7, quoted at Pet. App. 11a. After oral argument in the court of appeals, the 1984 Guidelines were replaced by the Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines* (1992). The court noted that the 1992 Guidelines do not affect the result in this case. Pet. App. 12a n.3.

[11] Petitioner quotes (Pet. 15 n.10) a Commission attorney's statement (from oral argument in the administrative case) that a 15%-20% price increase was needed to shift demand. Petitioner's own documents, however, show that switching occurred when the price of cal hypo rose by as little as 11%, see Pet. App. 17a n.6, and witnesses testified that a 10%-15% increase in cal hypo prices would shift demand to isos, see ID ¶¶ 220-221, 113 F.T.C. at 463-464.

sions of other courts. See *id.* at 18a ("research has not disclosed a case that mandates this percentage"). None of the cases petitioner cites (Pet. 18-21) holds that product-switching in response to the kind of price increases found in the record (see note 11, *supra*) is insufficient to establish a market.

The court's holding is also correct. Where, as here, industry members make pricing and other business decisions based on competition between the two products, it would be artificial to establish a rigid five percent rule. The evidence of "direct and head-to-head" competition between isos and cal hypo, ID ¶ 195, 113 F.T.C. at 458, supports their combination into a dry sanitizers market. The court of appeals took note of the extensive evidence that pricing, production levels, marketing strategy, and research and development decisions were all based in part on producers' and sellers' recognition of direct competition between isos and cal hypo. Pet. App. 19a-21a; see also *id.* at 35a n.2, 41a-43a & nn.7-8; ID ¶¶ 196-263, 113 F.T.C. at 458-471.[12] Moreover, as the court observed (Pet. App. 20a-21a):

> [Petitioner's] own business decisions were based in part on the goal of maintaining the price relationship between CAL/HYPO and ISOS. From this goal, it can easily be inferred that pricing decisions were

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[12] Petitioner emphasizes the ALJ's statement that the "price sensitivity between isos and cal hypo is not pronounced." Pet. 15, quoting ID ¶ 195, 113 F.T.C. at 458. The ALJ concluded, however, that that fact was outweighed by other evidence, including industry members' recognition of a price/volume relationship between the two chemicals, which "pervades the marketing and strategy documents of producers and importers." ID ¶ 196, 113 F.T.C. at 458.

based on the competitive relationship between the two products.

Such business decisions by industry members are evidentiary proxies for cross-elasticity, *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 218-219 & n.4 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987), because they show that competition from each other's products served as "economic restraints" on the ability to raise prices above competitive levels. *H.J., Inc.* v. *International Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989).

The record therefore provides substantial evidence that isos and cal hypo together formed an economically significant product market. In view of this Court's recognition of the importance of considering all of the facts bearing on market definition, see *United States* v. *Continental Can Co.*, 378 U.S. 441, 453, 456 (1964); *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 112 S. Ct. at 2090, the court of appeals' decision to sustain the Commission's finding is merely a fact-intensive application of, and decidedly not a "radical departure" (Pet. 20) from, accepted antitrust law principles.[13]

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[13] Petitioner argues (Pet. 8 n.4, 15) that a remand is warranted because the court allegedly "could not determine in which market" the Commission found anticompetitive effects. Because that question is neither presented by the petition nor fairly included therein, it is not before this Court for review. See *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam). Nor would it raise an issue meriting review. In any event, petitioner mischaracterizes the court's statement. The court said (Pet. App. 7a) that the Commission had not expressly stated whether its finding of a lessening of competition depended on the effects in the isos and dry sanitizers markets taken together, or rested on the effects in each market viewed independently. It is clear, however, that the Commission concluded that either analysis sustained its result,

3. The Commission found evidence of cross-elasticity of demand based, *inter alia*, on a shifting from cal hypo to isos between 1979 and 1982, when the price of cal hypo began to rise closer to the price of isos. See Pet. App. 17a & n.6, 19a-20a, 42a-43a, 45a. Petitioner claims that during that period, isos' prices were artificially constrained by dumping by Japanese manufacturers, and that the price convergence thus should have been disregarded because it was flawed by what petitioner characterizes as a variation of the so-called "Cellophane trap." Pet. 7-8, 22-24.[14]

Because petitioner never raised its "Cellophane trap" argument before the ALJ or the Commission, it was not properly before the court of appeals.[15] *Marathon Oil Co.* v. *United States*, 807 F.2d 759, 767-768 (9th Cir. 1986), cert. denied, 480 U.S. 940 (1987); *Litton Indus., Inc.* v. *FTC*, 676 F.2d 364, 369 (9th Cir. 1982). Accordingly, that

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see *id.* at 45a-46a, 62a-65a, 69a-71a, 76a, and the court ultimately analyzed the case on that basis. *Id.* at 8a, 15a-16a.

[14] The "Cellophane trap" refers to criticisms of *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). Some writers have suggested that the Court erred in holding that various flexible wrappings were in the same product market as cellophane because the monopolist Du Pont, which held a monopoly in cellophane, had already achieved supracompetitive monopoly prices, forcing buyers to use other products that would not have been considered good substitutes had cellophane been sold at a lower, competitive price. See, *e.g.*, R. Posner, *Antitrust Law: An Economic Perspective* 128 (1976). The perceived problem is that "at a high enough price even poor substitutes look good to the consumer." *Ibid.* Thus, the "Cellophane trap" refers solely to a problem in determining relevant markets where prices are at a supracompetitive level due to the presence of monopoly power, not where, as here, prices are allegedly at a subcompetitive level.

[15] The Commission raised that objection to petitioner's argument in the court of appeals. See FTC C.A. Br. 19.

argument—since it was rejected by the court of appeals—is not properly before this Court, regardless of whether the court below improperly considered it. *Moog Indus., Inc.* v. *FTC*, 355 U.S. 411, 414 (1958); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Even if considered, petitioner's argument lacks merit. The court of appeals held that petitioner's argument that the price relationship between isos and cal hypo had been artificially distorted by Japanese dumping of isos was refuted by evidence that cal hypo was subject to the same price pressures as the result of Japanese dumping of cal hypo. The court concluded that the fact that both products experienced the same price pressures meant that the narrowing in price between isos and cal hypo "was not artificial." Pet. App. 17a-18a; see also *id.* at 19a-20a. The court also noted that petitioner's brief in the antidumping proceedings "implicitly acknowledges that other factors played at least some part in reducing the gap," *id.* at 19a-20a.[16]

Petitioner contends (Pet. 8, 23-24) that the court violated the principle of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), by considering the Commission's response to petitioner's "Cellophane trap" argument, because the response was presented only in the Commission's appellate brief and had not been previously articulated by the agency. Where a court, however, improperly reaches the merits of a party's argument even though it was raised for the first time in the party's appellate brief, the court necessarily must review the issue in light of the response presented in the agency's brief. In this case, the

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[16] Isos price increases were also restrained by normal market forces, including a price war initiated by FMC. See ID ¶¶ 402-405, 113 F.T.C. at 495-496.

inferences drawn by the court are solidly based in the record.[17] There is no basis for this Court to consider any contention based on *Chenery* in the circumstances of this case.

4. Finally, petitioner contends (Pet. 24-26) that the court of appeals erred in upholding the Commission's order to the extent it required divestiture of the acquired FMC facility for manufacturing CA. In light of the presumption in favor of complete divestiture as a remedy for unlawful acquisitions, *Ford Motor Co.* v. *United States*, 405 U.S. 562, 563 (1972); *RSR Corp.* v. *FTC*, 602 F.2d 1317, 1326 (9th Cir. 1979), cert. denied, 445 U.S. 927 (1980); Pet. App. 4a n.1, the court correctly held that the Commission did not abuse its broad remedial discretion in requiring that relief in this case. See, *e.g.*, *Moog Indus.* v. *FTC*, 355 U.S. at 413; *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957).

a. According to petitioner (Pet. 25), the order to divest the acquired FMC CA plant is flawed because "divestiture of [petitioner's] CA facility is unrelated to the acquisition's purported anticompetitive effects in the dry sanitizer market," and because the Commission's determination that a newly divested company needs the CA

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[17] Petitioner's assertion (Pet. 24 n.18) that evidence concerning Japanese dumping of cal hypo was admitted solely to determine ease of entry by Japanese producers is contradicted by the record, which shows that the evidence was used for other purposes. See ID ¶¶ 215-216, 233, 351, 113 F.T.C. at 462-463, 466, 486 (product and geographic market definitions). Petitioner also claims (Pet. 24 n.18) that the record "contains no evidence to the effect of cal hypo dumping on cal hypo prices." The International Trade Commission, however, found that dumping injured domestic cal hypo producers, see ID ¶ 624, 113 F.T.C. at 543, and both ITC staff and petitioner noted that cal hypo prices rose after the antidumping order was entered. Pet. App. 49a.

facilities to ensure its viability is inconsistent with the conclusion that petitioner was a viable isos manufacturer despite its inability to efficiently manufacture its own CA.

The divestiture of the CA plant is related to the dry sanitizer market, because it was designed "to ensure the viability of the divested entity" as a participant in that market. Pet. App. 30a. Contrary to petitioner's claim (Pet. 8-9, 25), that view is not inconsistent with the Commission's finding, affirmed by the court, that petitioner was a viable isos producer even without its own CA supply. Petitioner is a leader in the industry; a third party who acquires the divested assets might well lack petitioner's expertise and resources. Pet. App. 74a-75a. The Commission's desire to "ensure" the success of the divestiture does not indicate that the Commission thought that a captive CA supply is indispensable to viability. *Id.* at 27a.

Moreover, the Commission's remedy was justified because partial divestiture was not feasible. FMC's isos and CA facilities are in the same plant. As the Commission stated (Pet. App. 75a):

> [Petitioner] failed to introduce evidence that the two facilities are separate, stand-alone operations, rather than integrated facilities that share common facilities for power, emission control, receiving and shipping, and other functions. The record does not support a conclusion that the isos plant would be technically and functionally viable separate from the cyanuric acid plant, quite apart from the question whether it would be commercially viable.

The court of appeals noted that petitioner was unable to refute that critical fact. *Id.* at 30a.

b. Suggesting that changed conditions between the administrative trial and the present might preclude petitioner from obtaining CA from Nissan, petitioner contends (Pet. 9, 25-26 & n.19) that the court should have remanded the case to the Commission to determine whether petitioner will be able to manufacture isos after it finally divests FMC's CA facilities. Petitioner did not make that argument before the Commission or in its initial appeal, and has accordingly waived it. See p. 16, *supra*; *FTC* v. *Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983).

In any event, only truly exceptional circumstances mandate reopening on the ground that conditions have changed while a case wends its way through the process of review. *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 294-296 (1974); *ICC* v. *City of Jersey City*, 322 U.S. 503, 514-516 (1944); *American Financial Services Ass'n* v. *FTC*, 767 F.2d 957, 964 n.5 (D.C. Cir. 1985), cert. denied, 475 U.S. 1011 (1986). Petitioner's unsubstantiated allusion to changed conditions does not meet this Court's stringent test. Petitioner makes no attempt to show that it is unable to obtain CA from Nissan or another source or to make CA as a result of knowledge that petitioner has acquired in the intervening years.[18]

[18] In any event, petitioner's proper remedy would be to apply to the Commission to reopen after the order becomes final. See 15 U.S.C. 21(b), 45(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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